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No. 83-5954

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WAYNE LINDAHL, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit has jurisdiction under 5 U.S.C. 7703 and 28 U.S.C. 1295 to review a decision of the Merit Systems Protection Board affirming the Office of Personnel Management's denial of an employee's application for disability retirement benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-59a) is reported at 718 F.2d 391. The opinion of the Merit Systems Protection Board (Pet. App. 60a-69a) is unreported. The decisions of the Office of Personnel Management (Pet. App. 70a-75a) also are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1983 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. 8347 provides in pertinent part:

> (a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the

> Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.
>
> (b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.
>
> (c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

STATEMENT

1. On September 4, 1979, the Department of the Navy notified petitioner that it proposed to separate him from his civilian position because of his physical inability to perform the duties of his position (Pet. App. 84a-85a). Petitioner immediately filed an application with the Office of Personnel Management (OPM) for civil service disability retirement benefits (id. at 86a-87a). By letter dated September 17, 1979, the

Department of the Navy notified petitioner that, effective October 5, 1979, he would be removed from his position (id. at 88a-89a). The letter advised petitioner that he could challenge his removal by filing an appeal with the Merit Systems Protection Board (MSPB) (id. at 89a), but there is no indication that petitioner ever filed such an appeal.

On March 21, 1980, OPM denied petitioner's application for disability retirement benefits (Pet. App. 71a), and OPM sustained that denial on reconsideration because the evidence in the record failed to establish that he was disabled (id. at 72a-75a). Petitioner appealed OPM's reconsideration decision to the MSPB on January 9, 1981 (id. at. 60a). The MSPB presiding official held that petitioner had the burden of proving by a preponderance of the evidence that he had a disease or injury that rendered him totally disabled (id. at 61a-62a) and concluded after a thorough review of the evidence that petitioner had failed to carry this burden (id. at 62a-67a). Accordingly, the presiding official affirmed OPM's denial of petitioner's application for disability retirement benefits (id. at 67a).

2. On June 10, 1981, petitioner filed a petition for review of the MSPB decision in the United States Court of Claims. On October 1, 1982, the effective date of the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, 96 Stat. 25) (FCIA), the Court of Claims was abolished and this case was transferred to the docket of the newly established United States Court of Appeals for the Federal Circuit (Pet. App. 2a).

The court of appeals, sitting en banc, granted the government's motion to dismiss the appeal, concluding that it did not have jurisdiction under 5 U.S.C. 7703 to review the MSPB's decision. The court held that 5 U.S.C. 8347(c), which provides that determinations by OPM on questions of disability in connection with retirement applications are "final and conclusive

and are not subject to review," precludes all review of OPM disability determinations except for the administrative review by the MSPB that is expressly authorized by 5 U.S.C. 8347(c) and (d) (Pet. App. 4a-7a). The court also noted that Congress in 1980 had enacted a single narrow exception to this preclusion of review: 5 U.S.C. 8347(d)(2) allows an employee to obtain judicial review in the court of appeals pursuant to 5 U.S.C. 7703 if he was found disabled by the MSPB on the basis of his mental condition in a case in which the agency, rather than the employee, had filed the application for disability benefits. In the court's view, this exception provided compelling evidence that Congress intended to foreclose a right of judicial review on questions of disability in all other cases (id. at 7a). Because petitioner did not fall within this limited exception, the court held that judicial review was not available (id. at 8a).

The court of appeals recognized that its predecessor, the Court of Claims, had held in Scroggins v. United States, 397 F.2d 295, cert. denied, 393 U.S. 952 (1968), and subsequent decisions brought under the Tucker Act (28 U.S.C. 1491) that, notwithstanding the finality clause in 5 U.S.C. 8347(c), the Court of Claims could set aside a Civil Service Commission ruling on disability where there had "been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination" (Pet. App. 9a-10a, quoting 397 F.2d at 297). The court explained, however, that those decisions dealt with retirement that was forced by the agency, rather than a voluntary retirement by the employee (id. at 10a). The court further explained that if Scroggins and its Court of Claims progeny were read to hold that 5 U.S.C. 8347(c) leaves room for judicial review of voluntary disability retirement claims, those decisions "to that extent would have to be viewed as wrongly

decided and overruled" (Pet. App. 11a). In the court's view, to hold that MSPB decisions on disability questions generally are subject to judicial review pursuant to 5 U.S.C. 7703 "would be to render superfluous" Congress's action in enacting 5 U.S.C. 8347(d)(2) in 1980 explicitly to provide for judicial review pursuant to 5 U.S.C. 7703 in the limited category of cases involving a finding of mental disability where the agency, not the employee, had filed the application (Pet. App. 19a).

Judge Nichols filed a concurring opinion (Pet. App. 24a-29a). He stressed that in United States v. Erika, Inc., 456 U.S. 201 (1982), this Court had reversed a Court of Claims decision that had employed the rationale of Scroggins to permit review of certain aspects of a claim for benefits under Part B of the Medicare Program notwithstanding Congress's preclusion of review of the amount of benefits under Part B (see Erika, Inc. v. United States, 634 F.2d 580, 587 (Ct. Cl. 1980)). Judge Nichols reasoned that this Court's decision in Erika indicated that the express bar in 5 U.S.C. 8347(c) to judicial review of MSPB decisions on questions of disability likewise could not be avoided under the Scroggins rationale permitting review of legal or procedural, but not factual, issues (Pet. App. 32a-33a). Judge Nichols also noted that the Court of Claims itself had not applied Scroggins to avoid the comparable statutory bar in 38 U.S.C. 211(a) to the judicial review of decisions on claims for veterans benefits, and that this Court had recognized a right of judicial review notwithstanding this bar only where the plaintiff challenged the constitutionality of a veterans benefits statute (Pet. App. 31a, citing Johnson v. Robison, 415 U.S. 361 (1974)).

Judge Nies also filed a concurring opinion. She was of the view that all judicial review on the question of disability is "clearly precluded" by 5 U.S.C. 8347(c) and, in addition, that no aspect of a decision denying an application for disability benefits could be reviewed directly in the Federal Circuit pursuant to 5 U.S.C. 7703, except in the involuntary mental disability retirement cases covered by 5 U.S.C. 8347(d)(2) (Pet. App. 40a).

Four judges dissented, concluding that review of voluntary disability retirement claims should be available under the Scroggins formula notwithstanding the preclusion of review in 5 U.S.C. 8347(c) (Pet. App. 41a-57a).

ARGUMENT

The decision of the court of appeals is correct. Although several other courts of appeals have reached a contrary conclusion, the conflict of rulings on the reviewability under 5 U.S.C. 7703 of administrative disability determinations in connection with applications for civil service retirement benefits is of no continuing importance, because Congress has now provided that the court below has exclusive jurisdiction over petitions for review of MSPB decisions. This Court recently denied certiorari in a closely related civil service disability retirement case from the Federal Circuit in which a similar divergence of appellate rulings was of no continuing importance for the same reason. See Frank v. OPM, No. 83-5914, cert. denied (March 19, 1984)). There is no occasion for a different disposition here. Review by this Court therefore is not warranted.

1.a. The text of the Civil Service Retirement Act establishes that the court of appeals did not have jurisdiction under 5 U.S.C. 7703 in this case. OPM is directed by statute to

administer the civil service retirement program generally and to adjudicate all claims for benefits under that program. 5 U.S.C. 8347(a) and (b). The latter responsibility extends to the determination of all issues that bear on a claim for benefits, including whether the employee has completed the requisite years of service, computation of the amount of the annuity, etc. In addition, 5 U.S.C. 8347(c) specifically provides that OPM "shall determine questions of disability and dependency" arising under the retirement program and that "[e]xcept to the extent provided under subsection (d)" of 5 U.S.C. 8347, "the decisions of [OPM] concerning these matters are final and conclusive and are not subject to review." Subsection (d)(1) in turn provides that an administrative action or order affecting the rights of an individual or of the United States under the retirement program may be appealed to the MSPB under procedures prescribed by the MSPB. This subsection does not, however, provide for judicial review of a decision by OPM or the MSPB that the applicant is not disabled.

Under the statutory scheme, then, OPM's decisions on questions of disability are "final and conclusive and are not subject to review," except for administrative review of OPM's decision by the MSPB. Congress thus explicitly has foreclosed judicial review of an administrative determination that an applicant for retirement benefits is not disabled. In this case, petitioner's application for retirement benefits was denied by OPM and the MSPB because he was found not to be disabled. As the court of appeals recognized (Pet. App. 6a-7a), petitioner's attempt to seek judicial review of that administrative determination falls squarely within the statutory bar in 5 U.S.C. 8347(c).

This conclusion is consistent with this Court's decision in Johnson v. Robison, 415 U.S. 361 (1974), which construed the

parallel statutory bar in 38 U.S.C. 211(a) to judicial review of decisions of the Veterans Administration on applications for veterans benefits. Section 211(a), like 5 U.S.C. 8347(c), provides that the administrative determination is "final and conclusive" and shall not be subject to review. This Court recognized in Johnson v. Robison that Congress had foreclosed judicial review of individual benefit claims because of the wide variety of medical, legal, and other technical questions that often are involved and because of the need to ensure adequate and uniform resolution of these questions without expensive and time-consuming litigation. 415 U.S. at 370-373 & n.12. These same considerations underlie the bar to judicial review of the often complex medical, legal, and other questions relating to a determination of disability under the civil service retirement system. 1 / In contrast, where Congress has wished to provide for judicial review of questions of disability under federal

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1 / The Court held in Johnson v. Robison that 38 U.S.C. 211(a) does not preclude a judicial challenge to the constitutionality of a veterans benefits statute. 415 U.S. at 366-374. Similarly here, petitioner attempts to avoid the parallel preclusion of review in 5 U.S.C. 8347(c) by challenging the decisions of OPM and the MSPB on constitutional grounds. This attempt is without merit. As an initial matter, petitioner does not challenge the constitutionality of the civil service retirement statute; he challenges administrative actions under it. And even those challenges are wholly insubstantial.

Petitioner first contends (Pet. 8) that the Department of the Navy failed to follow a Federal Personnel Manual provision (FPM 831-1, S10-10a(6)) requiring that an employee be kept in pay status pending a ruling on an application for disability benefits. However, the provision petitioner cites applies only where the agency has filed the application for disability benefits (Pet. App. 80a, 83a); here, petitioner filed the application. In any event, if a particular regulation is not itself mandated by the Constitution, as the Federal Personnel Manual provision petitioner cites clearly is not, a violation of that regulation does not rise to the level of a constitutional violation. United States v. Caceres, 440 U.S. 741, 751-752 (1979); Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 92 n.8 (1978). Petitioner's other contention -- that it was unconstitutional for OPM and the MSPB to place on him the burden of proving his entitlement to disability benefits (see Pet. 8-10) -- is equally without merit. See Mathews v. Eldridge, 424 U.S. 319, 336 (1976).

benefits programs -- e.g., as under the Social Security disability program -- it has expressly so provided. See 42 U.S.C. (& Supp. V) 421(d) and 405(g). Indeed, as we now explain, Congress has expressly provided for such review pursuant to 5 U.S.C. 7703 in one narrow category of disability cases under the civil service retirement program itself, thereby reinforcing the conclusion that such review is barred in all other cases where Congress has not expressly so provided.

b. In 5 U.S.C. 8347(d)(2), enacted in 1980, 2 / Congress provided an exception to the general rule barring judicial review of questions of disability under the civil service retirement program. Under this newly enacted Paragraph (2), if OPM has found an individual to be disabled "in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement * * *, the procedures under [5 U.S.C. 7701] shall apply and the decision of the Board shall be subject to judicial review under [5 U.S.C. 7703]" (emphasis added). In this case, the application for disability benefits was filed by petitioner, not the Department of the Navy, and it was based on an alleged physical, not mental, disability. For these reasons, this case clearly does not fall within the authorization in 5 U.S.C. 8347(d)(2) for judicial review pursuant to 5 U.S.C. 7703. The fact that Congress expressly authorized judicial review pursuant to 5 U.S.C. 7703 in that one narrow category of cases "provides persuasive evidence that Congress deliberately intended to foreclose" judicial review pursuant to 5 U.S.C. 7703 in all other cases, such as that involved here. United States v. Erika, Inc., 456 U.S. 201, 208 (1982). Section 8347(d)(2) thereby reinforces the conclusion indicated by the preclusion of

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2 / Pub. L. No. 96-500, 94 Stat. 2696.

review in 5 U.S.C. 8347(c): the court of appeals did not have jurisdiction in this case under 5 U.S.C. 7703 to review the determination by OPM and the MSPB that petitioner was not disabled.

The logic and purpose of the narrow exception in 5 U.S.C. 8347(d)(2) further reinforces this conclusion. Section 8347(d)(2) states that the procedures in 5 U.S.C. 7701 for review by the MSPB and in 5 U.S.C. 7703 for judicial review of the MSPB's decision shall be followed in the agency-filed, mental disability cases. Sections 7701 and 7703 are contained in Subpart F of Title 5, entitled "Labor-Management and Employee Relations." The formal administrative review procedures in 5 U.S.C. 7701 3 / were intended to apply to actions taken against an employee arising out of those relations, such as a suspension, removal, or reduction in grade. Section 8347, in contrast, appears in Subpart G of Title 5, entitled "Insurance and Annuities." Unlike in an adverse action and other matters typically covered by Section 7701, it is the employee who ordinarily initiates the proceedings under Section 8347 by filing an application for benefits. The two sections therefore deal with quite different subject matters, and it is not surprising that Congress would provide for distinct review mechanisms in the two settings. See Dawson v. MSPB, 712 F.2d 264, 268-269 (7th Cir. 1983); Lancellotti v. OPM, 704 F.2d 91, 95-96 (3d Cir. 1983).

The congressional directive in 5 U.S.C. 8347(d)(2) that the procedures in Section 7701 nevertheless be followed in one

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3 / Under 5 U.S.C. 7701(a), the employee is entitled to an evidentiary hearing before the MSPB or a Board representative, for which a transcript will be kept, and to be represented by an attorney or other representative. Under 5 U.S.C. 8347(d)(1), in contrast, review of civil service retirement matters by the MSPB is pursuant to whatever "procedures [are] prescribed by the Board."

limited category of retirement cases is consistent with this scheme. Section 8347(d)(2) provides for appeal to the MSPB pursuant to the formal procedures in Section 7701 not where OPM has found that the applicant is not disabled, as in the present case. Rather it applies where OPM has found that the individual is disabled, because of his mental condition, and only where the application was filed by the agency, not the employee. Especially in light of the stigma that may attach to an agency allegation -- and OPM finding -- that an employee has a mental disability, such a situation closely resembles an adverse action of the type generally covered by 5 U.S.C. 7701(a). Moreover, the legislative history notes that 5 U.S.C. 8347(d)(2) was enacted "to protect the rights of individuals" because of a perceived abuse of such "involuntary, agency-initiated disability retirements" in order "to force unproductive or otherwise problem employees out of active service" (S. Rep. 96-1004, 96th Cong., 2d Sess. 2 (1980)). See also id. at 5; H.R. Rep. 96-1080, 96th Cong., 2d Sess. 3, 5 (1980). It is consistent with this perception for Congress to require that the formal administrative procedures in 5 U.S.C. 7701 be followed in this sensitive area and also to provide the same opportunity for judicial review pursuant to 5 U.S.C. 7703 as is available when an adverse action is taken against an employee. These policy considerations simply do not obtain where, as here, the employee files the application for retirement benefits based on an alleged physical disabilty.

c. It is true that the Court of Claims previously had held in suits brought under the Tucker Act (28 U.S.C. 1491) that, notwithstanding the bar to judicial review in 5 U.S.C. 8347(c), it could review administrative denials of disability benefits to the extent of determining whether there had "been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart

of the administrative determination." See Scroggins v. United States, 397 F.2d 295, 297, cert. denied, 393 U.S. 952 (1968). However, for a number of reasons, the Federal Circuit correctly declined to rely on Scroggins to justify judicial review here.

First, the court of appeals' decision in this case concerns only the availability of judicial review of an MSPB decision directly in the Federal Circuit pursuant to the special statutory review procedure in 5 U.S.C. 7703(a) and (b). The court expressly declined to address the distinct question whether jurisdiction would lie under the Tucker Act to decide whether petitioner's disability entitled him to an annuity, explaining that this question was for the Claims Court to determine in the first instance. Pet. App. 8a n.1; see Pub. L. No. 97-164, §133(a), 96 Stat. 39, to be codified at 28 U.S.C. 1491(a)(1). Only if the Claims Court holds that jurisdiction does not lie under the Tucker Act and the Federal Circuit affirms that holding [4] would this Court be confronted with the question whether judicial review of civil service disability determinations is available in any circumstances under the Scroggins rationale.

Second, the Scroggins line of cases in the Court of Claims involved forced retirements of the employee by the agency because of disability and had its origins in cases in which the agency, not the employee, filed the application for disability

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[4] The Federal Circuit has exclusive jurisdiction of an appeal from a final decision of the Claims Court. Pub. L. No. 97-164, §127(a), 96 Stat. 37, to be codified at 28 U.S.C. 1295(a)(3). A Tucker Act suit also could be brought in federal district court pursuant to 28 U.S.C. 1346(a)(2) if the amount in controversy did not exceed $10,000, but exclusive appellate jurisdiction in such a case likewise would lie in the Federal Circuit. Pub. L. No. 97-164, §127(a), 96 Stat. 37, to be codified at 28 U.S.C. 1295(a)(2).

benefits. 5 / For this reason, as the court below recognized (Pet. App. 11a), the Scroggins line of cases does not warrant a broad assertion of jurisdiction to review all MSPB decisions on civil service disability issues, as petitioner apparently urges. See Pet. 11, 14, 15-16. In addition, as the court of appeals also observed, the concern that apparently led to the Court of Claims' initial application of the Scroggins formula -- i.e., "that administrators might unfairly force individuals from federal employment with an attached mental condition 'stigma'" -- has now "been fully met by Congress' enactment of [5 U.S.C.] 8347(d)(2)," which provides for formal administrative and judicial review in such cases pursuant to 5 U.S.C. 7701 and 7703. Pet. App. 11a. Because Congress thus has demonstrated that it will fashion an explicit exception to the bar to judicial review in 5 U.S.C. 8347(c) where it believes that judicial review is warranted, the court below properly declined to follow Scroggins as a basis for judicial review pursuant to 5 U.S.C.

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5 / See Gaines v. United States, 158 Ct. Cl. 497, 500-502 (Ct. Cl.), cert. denied, 371 U.S. 936 (1962); Scroggins v. United States, 397 F.2d at 297; McGlasson v. United States, 397 F.2d 303, 307 (Ct. Cl. 1968); McFarland v. United States, 517 F.2d 938, 942-943 (Ct. Cl. 1975), cert. denied, 423 U.S. 1049 (1976); Allen v. United States, 571 F.2d 14, 17 (Ct. Cl. 1978); Fancher v. United States, 588 F.2d 803, 806 (Ct. Cl. 1978); Polos v. United States, 621 F.2d 385, 391-392 (Ct. Cl. 1980). In the first four cases, the agency actually filed the application for disability benefits, which was approved by the Civil Service Commission; the employee, contending that he was not disabled and therefore should not have been retired, sought to recover the difference between back pay for the position and the disability retirement benefits. In the latter three cases, the employee filed an application for disability retirement benefits after the agency terminated his employment because he was unable to perform his duties. In Fancher and Polos, the separated employee sought to recover either back pay (on the theory that he was improperly terminated) or retirement benefits (on the theory that his application for retirement benefits was improperly denied). In Allen, the separated employee ultimately did not challenge his termination and sought to recover only the difference between the discontinued service annuity he was awarded and the disability annuity he sought.

7703 where Congress itself has chosen not to provide an exception to the preclusion of review in 5 U.S.C. 8347(c). 6 /

Third, as Judge Nichols observed in his concurring opinion (Pet. App. 32a-33a), this Court's decision in United States v. Erika, Inc., firmly supports the Federal Circuit's determination not to follow Scroggins here. The Court held in Erika that judicial review of benefit amount determinations under Part B of the Medicare Program is foreclosed, relying upon Congress's express provision in 42 U.S.C. 1395ff(b) for judicial review under the Part A Medicare Program and its omission of any such provision under Part B. 456 U.S. at 206-208. In reaching this conclusion, the Court reversed the holding of the Court of Claims that this "implicit" preclusion of review barred judicial review only of factual determinations, not statutory or procedural challenges to the administrative decision. Erika, Inc. v. United States, 634 F.2d 580, 585-586 (1980). See 456 U.S. at 205. Significantly, moreover, the Court of Claims in Erika relied upon the Scroggins line of cases under the Civil Service Retirement Act that permitted review of statutory or procedural issues notwithstanding the explicit preclusion of review in 5 U.S.C. 8347(c). See 634 F.2d at 587. Against this background, this Court's unanimous reversal of the Court of Claims' holding in

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6 / The House Report on the 1980 amendment does discuss the Court of Claims' decisions in Scroggins, McGlasson, and McFarland. See H.R. Rep. 96-1080, 96th Cong., 2d Sess. 8 (1980). All three of those cases, however, arose under the Tucker Act and involved agency-filed applications based on mental disability. Congress enacted the special provision for judicial review pursuant to 5 U.S.C. 7703 in such situations, thereby superseding any separate basis for review in a suit brought pursuant to the general jurisdictional grant in the Tucker Act. Congress's failure to provide for review under 5 U.S.C. 7703 in other circumstances indicates that it did not intend for a disappointed applicant for disability benefits, such as petitioner, to obtain review under 5 U.S.C. 7703 as well; if review already was available pursuant to Section 7703, the 1980 amendment would have been unnecessary. The continued vitality of the Scroggins rationale for limited review in other cases brought under the Tucker Act is not at issue here. Petitioner's contentions (Pet. 13-14) that Congress understood in 1980 that limited judicial review was available in the Court of Claims under Scroggins therefore is irrelevant.

Erika substantially undermines the Scroggins rationale for avoiding the explicit preclusion of review of disability determinations under the Civil Service Retirement Act. See Hackett v. OPM, 721 F.2d 580, 582 (6th Cir. 1983) ("The Scroggins rule has been eroded considerably, if not completely, by the decision in [Erika]"); Lancellotti v. OPM, 704 F.2d 91, 97 n.10 (3d Cir. 1983) ("Erika thus casts considerable doubt on the continued validity of Scroggins and its progeny").

2. A number of other courts of appeals likewise have held that the decisions by OPM and the MSPB on questions of disability are not subject to judicial review under 5 U.S.C. 7703. See Hackett v. OPM, 721 F.2d 580, 582 (6th Cir. 1983); Chase v. OPM, 695 F.2d 790, 791 (4th Cir. 1982); Campbell v. OPM, 694 F.2d 305, 306-308 (3d Cir. 1982); 7 / Morgan v. OPM, 675 F.2d 196, 198-200 (8th Cir. 1982). As petitioner points out (Pet. 15-16), a number of other courts of appeals have reached a contrary conclusion, relying upon Scroggins. See Pitzak v. OPM, 710 F.2d 1476, 1478-1479 (10th Cir. 1983); Turner v. OPM, 707 F.2d 1499, 1502-1503 (D.C. Cir. 1983); McCard v. MSPB, 702 F.2d 978, 981-983 (11th Cir. 1983); Parodi v. MSPB, 690 F.2d 731, 734-737 (9th Cir. 1982). This division of authority is of no continuing importance, however, because the regional courts of appeals no longer have jurisdiction to review decisions of the MSPB pursuant to 5 U.S.C. 7703.

Section 205 of the Civil Service Reform Act of 1978 (CRSA) (Pub. L. No. 97-164, 92 Stat. 1143) added the new Section 7703 to Title 5 to provide a special statutory procedure for judicial review of decisions by the MSPB, which assumed the adjudicatory functions of the Civil Service Commission. Section 206 of the CSRA amended 28 U.S.C. 2342 to grant jurisdiction to the regional courts of appeals and the Court of Claims to review MSPB

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7 / See also Lancellotti v. OPM, 704 F.2d 91, 95-97 (3d Cir. 1983).

decisions, with the exception of cases involving charges of discrimination, which are subject to trial de novo in district court. See 28 U.S.C. (Supp. V) 2342(6) and 5 U.S.C. (Supp. V) 7703(b). It was pursuant to this jurisdictional grant that the regional courts of appeals rendered the various decisions cited above.

However, in the Federal Courts Improvement Act of 1982 (FCIA) (Pub. L. No. 97-164, 96 Stat. 37, 45), Congress removed jurisdiction from the regional courts of appeals to review MSPB decisions pursuant to 5 U.S.C. 7703 and provided for exclusive jurisdiction over such actions in the United States Court of Appeals for the Federal Circuit. Pub. L. No. 97-164, 96 Stat. 37, 45, §144(1) (codified at 5 U.S.C. 7703(b)(1)) and §127(a) (to be codified at 28 U.S.C. 1295(a)(9)). Thus, the regional courts of appeals do not have jurisdiction over any petition for review under 5 U.S.C. 7703 filed after the October 1, 1982 effective date of the FCIA. 8 / Accordingly, the disagreement among the courts of appeals regarding the existence of jurisdiction under 5 U.S.C. 7703 to review decisions of OPM and the MSPB on questions of disability in civil service retirement cases is of no practical significance. For precisely this reason, the Court recently denied certiorari in another civil service disability retirement case in which there was a similar conflict of no continuing importance (Frank v. OPM, No. 83-5914, cert. denied, (Mar. 19, 1984)); there is no reason for a different result here. This is especially so since administrative decisions on disability issues were rarely set aside under the Scroggins standard in any event, and the availability of judicial review therefore was of limited value.

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8 / See Pub. L. No. 97-164, §402, 96 Stat. 57.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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